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IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,
Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S PETITION FOR REHEARING

LOUIS NIZER,
GERALD MEYER,
GERALD F. PHILLIPS,
477 Madison Avenue,
New York, New York 10022.

LAWRENCE S. LESSER,
1625 K Street, N.W.
Washington, D.C. 20006.
Counsel for Respondent.

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON,
of Counsel.

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RESPONDENT'S PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of this Court respondent petitions for rehearing of the decision herein dated June 17, 1968, not only because of its impact on copyright in reversing legal principles pronounced by this Court for half a century and uniformly accepted as expressing the essential purpose of the Copyright Act, but also because of the dire and unintended consequences of the decision on creative and performing artists in all fields and the industries dependent on them.

I

The holding here that CATV is nothing more than "a well-located antenna with an efficient connection to the viewer's television set" is in direct conflict with *Southwestern*, Nos. 363 and 428, *Oct. T. 1967, and both cannot stand.*

The Court must necessarily have overlooked the inherent inconsistency and incompatibility between its decision in this case and its decision a week earlier, in *United States* v. *Southwestern Cable Co.*, Nos. 363 and 428, Oct. T. 1967, — U.S. —, 36 USLW 4553, June 10, 1968. Thus, in *Southwestern*, this Court held that CATV systems were engaged in "the simultaneous retransmission of communications" consisting of "the intercepted signals" of television broadcasting stations, and were subject to regulation by the Federal Communications Commission under the Communications Act as being engaged in " 'the transmission of * * * signals, pictures and sounds' * * * by radio or cable" in interstate communication within the meaning of the Act. Slip Op. 10, 11, 36 USLW at 4556, 4557. In reaching this conclusion, the Court described what CATV systems do in the following terms, Slip Op. 3, 36 USLW at 4554:

> CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers.

Yet, in this case, the Court held that a CATV system was a mere adjunct to its subscribers' television sets which,

> no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. Slip Op. 8, 36 USLW 4658.

And although the Court here recognized, Slip Op. 8, 9, 36 USLW 4658, that CATV "plays an 'active' role in making reception possible in a given area", the Court equated such role to that of "ordinary television sets and antennas". But while, in a manner of speaking, CATV is, as the Court said here, an "antenna with an efficient connection to the viewer's television set", in *Southwestern*, Slip Op. 3, 10, 11, 36 USLW 4554, 4556, 4587, the Court recognized that such "connection" consists of devices which take the television signals received by the antenna and "amplify them, transmit them by cable or microwave, and ultimately distribute them by wire" to the television sets of a whole multitude of viewers, thus effecting to a vast audience "the simultaneous retransmission of communications" consisting of "the intercepted signals" of television broadcasting stations. Accordingly, what the Court speaks of here as a "mere efficient connection" appears in *Southwestern* as being a complete communications system which amplifies, transmits, or retransmits, and then distributes the signals of television broadcasting stations received or intercepted by the antenna to which *it* is connected.

If, however, CATV's amplification, transmission and distribution, in sum its operation as a complete communications system which engages in the simultaneous retransmissions of intercepted signals of television broadcasting stations, *i.e.*, its " 'active' role in making reception possible in a given area", are a function only of "viewing", as the Court here holds, then *Southwestern* presents a striking anomaly. For, there, in reaching its decision, the Court emphasized the finding of the Federal Communications Commission that the "unregulated explosive growth" of CATV "placed in jeopardy" the Commission's effectuation of its statutory "obligation of providing a widely dispersed * * * television service" with a "fair, efficient, and equitable distribution" of service among the "several States and communities", and the efficacy of its exercise of the

"authority" to allocate broadcasting zones or areas, "granted to it in furtherance of, these and other purposes", because of the "adverse impact" on broadcasting stations, existing and prospective, of CATV's "substantial competition" and its "dividing the available audiences and revenues". *Southwestern*, Slip Op. 7-9, 16-18, 36 USLW 4555-4556, 4558-4559.[1] Patently, it is an anomaly that what this Court here holds to be merely a function of "viewing" can be considered as having an "adverse impact" on television broadcasting, as a result of its "substantial competition" and its "dividing the available audiences and revenues", and as frustrating the FCC's allocation of broadcasting zones or areas. *Fortnightly* thus poses the strange and unaccustomed concept that consumers

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[1] Significantly, this Court observed in *Southwestern*, Slip Op. 17, fn. 43, 36 USLW 4558, 4559:

> It is pertinent that the Senate Committee on Interstate and Foreign Commerce feared even in 1959 that the unrestricted growth of CATV would eliminate local broadcasting. * * * The Committee concluded that CATV *competition* does have an effect on orderly development of television. [Emphasis supplied]

Again, in *Southwestern*, Slip Op. 18, 36 USLW 4559, this Court noted:

> * * * [T]he Commission feared that CATV might, by *dividing the available audiences and revenues*, significantly magnify characteristically serious financial difficulties of UHF and educational television broadcasts. [Emphasis supplied]

And again, in *Southwestern*, Slip Op. 18, fn. 44, 36 USLW 4559, this Court said:

> The Commission * * * concluded that 'one general factor giving cause for serious concern' * * * was that there is likely to be a 'severe' impact between new local stations * * * and CATV systems. * * * Similarly, a recent study has found that CATV systems may have a substantial impact upon station revenues, that many stations, particularly in small markets, cannot readily afford such *competition*. * * * [Emphasis supplied]

(here, viewers) of a product (here, television programs) by their consumption of it (here, viewing) compete with and adversely affect its producers (here, television broadcasters) and their marketing procedures (here, FCC broadcasting zones or areas).

The incompatibility of the Court's decisions here and in *Southwestern* is fundamental and reaches the very "function that CATV plays in the total process of television broadcasting and reception", on which the Court here says, "resolution" of the copyright "issue * * * depends", Slip Op. 6, 7, 360 USLW 4657, 4658. On this basis, *Southwestern* and *Fortnightly* cannot stand together because "the function that CATV plays in the total process of television broadcasting and reception" cannot, in the nature of things, at one and the same time be both that of a "communications system", *Southwestern*, Slip Op. 6, 36 USLW 455, in "competition" with broadcasting, and "dividing the available audiences and revenues", as *Southwestern* holds, Slip Op. 17, 36 USLW 4558 and that of nothing more than a "well-located antenna with an efficient connection to the viewer's television set", serving a "function * * * little different from that served by the equipment generally furnished by a television viewer". Slip Op. 8, 9, 36 USLW 4658.

II

The conflict between the decision here and that in *Southwestern* raises a grave question as to the constitutionality of governmental action which would limit reception anywhere via CATV of any television broadcast.

While *Southwestern* upholds, Slip Op. 20, 36 USLW 4559, the FCC's limited "authority to regulate CATV" in ways "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting", the Court expressly refrained from considering "the validity of the specific rules promulgated by the Commission for the regulation of CATV." Slip Op. 9, 36 USLW 4556. Accordingly, such questions are reserved for future consideration. Nevertheless, in *Southwestern*, Slip Op. 8, 15-19, 36 USLW 4556, 4558-4559, the Court noted the Commission's distant signals rule forbidding, with certain exceptions, "the importation by CATV of distant signals into the 100 largest television markets" and the compelling reasons which led the Commission to adopt it. If, however, as the Court here holds, CATV is no more than "a well-located antenna with an efficient connection to the viewer's television set", which "falls on the viewer's side of the line," and whose "'active' role in making reception possible in a given area" is only that of the "ordinary television sets and antennas", Slip Op. 8, 36 USLW 4658, then, the question is posed whether the Commission's "distant signals" rule, the keystone of its regulation of CATV, is not tantamount to prohibiting viewers from hearing and viewing such programs as they can receive through the use of a "well-located antenna with an efficient connection", such as might be "erected and owned" by viewers themselves. Slip Op.

9, 36 USLW 4658. Considered in this light, the Commission's rule prohibiting the importation of distant signals into the top 100 markets poses a grave constitutional question, for the use of a mere "well-located antenna with an efficient connection" does not involve the use of any of the limited available spectrum space, and, accordingly, the basis for the curtailment of First Amendment rights sanctioned in *National Broadcasting Co.* v. *United States,* 319 U.S. 190, is not present. In this posture, the question remains whether the denial of rights guaranteed by the First Amendment is constitutionally permissible as an exercise of the FCC's "authority to regulate CATV," as a measure "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Southwestern,* Slip Op. 20, 36 USLW 4559. *Cf. Griswold* v. *Connecticut,* 381 U.S. 479, 482; *Weaver* v. *Jordan,* 64 Cal. 2d 235, 411 P.2d 289 (1966). See also, *Martin* v. *Struthers,* 319 U.S. 141, 143; *Marsh* v. *Alabama,* 326 U.S. 501, 505-508. Otherwise put, the question would be whether, in the exercise of such authority, the Commission might constitutionally prohibit viewers from using reception devices enabling them to receive broadcasts from London, Paris, Moscow or Peking, for example—or, perhaps, from Pittsburgh or Los Angeles.[2]

If the keystone of the FCC's pattern of CATV regulation —its "distant signals" rule—should fail for want of constitutional validity, then, in the absence of copyright protection for their programs, broadcasting stations would, as the Commission has foreseen, succumb to the "unequal" competition of CATV, and the national communications policy in regard to television would be utterly frustrated.

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[2] In *Midwest Television, Inc.* v. *Mission Cable TV, Inc.,* Docket No. 16786 (June 26, 1968), 13 Pike and Fischer R.R.2d 698 (1968), the FCC prohibited "further carriage of Los Angeles signals by CATV systems in the San Diego area." A petition to review has been filed by Mission Cable TV, Inc. in the United States Court of Appeals for the Ninth Circuit.

Southwestern, Slip Op. 4-9, 15-19, 36 USLW 4554-4556, 4558-4559.[3]

We do not believe that the constitutional argument is valid, but only because CATV is a communications system engaged in the transmission of programs. If, however, *Fortnightly* stands, then as a practical matter, and in addition to the devastating consequences discussed below, the power of the FCC to deal with the problems created by CATV and to protect broadcasting against the unfair advantages of CATV may be severely curtailed, if not emasculated.

III

The holding that CATV does not "perform" imperils the whole fabric of copyright protection.

In holding that CATV does not "perform", the Court necessarily overlooked the crucial difference between viewing—or a "private performance"—on the one hand, and a "public performance", on the other, and that, under §§ 1(c) and 1(d) of the Copyright Act, copyright liability attaches only to "public performances".

In concluding that in doing what it does, CATV does not "perform", the Court reasoned, pp. 8, 9:

> "Essentially, a CATV system no more than enhances the viewer's capacity to receive the broad-

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[3] Such an attack on the FCC's present scheme for regulating CATV is reported as already being planned by CATV. See *TV Communications—The Professional Journal of Cable Television*, July, 1968, at p. 10, where it is said:

> *Litigation of certain FCC regulations*, particularly the "top 100" market restrictions, is a certainty in view of Supreme Court decision upholding Commission authority over cable television. Legal challenge will focus on alleged violations of the First and Fifth Amendments to the Constitution.

caster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. *The only difference in the case of CATV is that the antenna system is erected and owned not by its users, but by an entrepreneur.*" (Emphasis supplied)

In so reasoning, the Court clearly overlooked the compelling significance of the "only difference", which it thus dismissed out of hand.

In turning on his television set and watching the show, a "viewer" does not in any real sense "perform" the copyrighted work being broadcast, or at most, he "performs" it privately. Certainly, too, no performance, or at most, a private performance, is involved if the "viewer" is joined, socially, by friends and members of his family. Nor is the result any different if a television set is cooperatively owned, and the cooperators view the broadcast together, even if they are joined, socially, by their friends and members of their families. Yet what is thus no performance, or at most, a private performance, must indisputably at once become a public performance or a performance in public, within the meaning of Sections 1(c) and 1(d) of the Copyright Act, when the "viewer" invites and permits the public to watch the broadcast. Obviously, "the only difference" is the "viewer's" invitation and permission to the public to watch the broadcast. And, as this Court has held, if the invitation and permission to the public has a commercial purpose, what might have been

no performance, or at most a private performance, becomes not only a public performance, but a public performance for profit. *Herbert* v. *Shanley Company*, 242 U.S. 591.

A CATV system, indeed, includes a gigantic antenna which receives the signals broadcast by television stations, and to that extent and in that sense "falls on the viewer's side of the line", as the Court, p. 8, has put it. But CATV does not stop there. Simultaneously with receiving a broadcasting station's signals, it amplifies them and restransmits them to members of the public commercially, and for profit. Thus, like the passive "viewer" who invites the public to see the broadcast at a price, CATV transforms itself from a passive "viewer" to an active "performer" for profit when it retransmits the broadcast of the copyrighted work to the public commercially. The "only difference" between neighbors getting together and erecting a hilltop antenna for their own use and a CATV system (which is *not* a simple hill top antenna, as the record makes abundantly plain) is just that which distinguishes the "viewer" who watches a broadcast, socially, with his family and friends, and the "viewer" who commercially invites and permits the public to watch the broadcast.

In absolving CATV from copyright liability on the ground that CATV merely did for "viewers" what each viewer could do for himself without copyright liability—that an "enterpreneur" can do for the public what each member of the public could do for himself—the Court clearly overlooked the novelty of its holding, its utter incompatibility with hitherto well-settled and unquestioned principles in the field of copyright, and the devastating effect it must have on copyright protection.

Thus, it has been considered fundamental that no copyright liability attaches when a copyrighted story, poem or other writing is read out loud in privacy by the reader, or even in the presence and for the edification or entertainment of one or more auditors, at a gathering to which the

public is neither invited nor admitted. Nimmer on Copyright (1968) §§ 107.2, 107.21. Similarly, no copyright liability attaches when one plays a copyrighted musical composition under similar circumstances. Nimmer on Copyright (1968) §§ 107.2, 107.21. These are things that one can do for oneself without incurring copyright liability. On the other hand, when an *entrepreneur* undertakes commercially to read a copyrighted writing aloud, or to play a copyrighted musical composition, for the enjoyment of the public, copyright liability has always, and uniformly, been considered as attaching, even though every member of the public in attendance was himself free, without incurring copyright liability, to read the copyrighted writing aloud, or to play the copyrighted composition, for himself or for any gathering not comprising the public. The same consequences have followed in the case of recordings. Thus, anyone has been considered at liberty, without incurring copyright liability, to play for his own enjoyment and that of others not constituting the public, a phonograph record of the rendition of a copyrighted work. Nevertheless, an entrepreneur playing the same record commercially for the public's enjoyment has never been considered to be free of copyright liability merely because each member of his audience could have played the record for himself, and his family and friends, without such liability.[4]

It will be observed, moreover, that copyright liability *vel non* does not hinge on the similarity or dissimilarity, or the identity or otherwise of the means used in making the copyrighted work audible or visible, or both, as the case may be. Thus, whether the human voice, a piano, or other

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[4] *Remick Music Corp.* v. *Interstate Hotel Corporation of Nebraska*, 58 F. Supp. 513, aff'd 157 F. 2d 744 (8th Cir. 1946), cert. denied 329 U.S. 809; *Harms* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), aff'd sub nom. *Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3rd Cir. 1959); *Chappell & Co.* v. *Middletown Farmers Market & Auction Co.*, 334 F. 2d 303 (3rd Cir. 1964). Nimmer on Copyright (1968), § 107.21.

musical instrument, a phonograph and phonograph record, or the most advanced and complex of electronic equipment is the instrumentality employed, is wholly immaterial. What is determinative, however, is for whom it is employed, i.e., for the public or not. In sum, the identical "sounds" and "pictures", whether made in the identical manner and by means of identical instrumentalities, or not, will result in copyright liability, or not, depending upon whether they are made "publicly" or "in public", or not.

The foregoing reflects basic principles underlying copyright with which the Court's decision here is wholly incompatible. If the startling principle applied here is equally applicable in the example given above—and the Court suggests no reason why it should not be—little is left of the fabric of copyright protection. Nothing in the Copyright Act, and nothing in any of the myriad of copyright cases decided by the courts since the enactment of the first copyright act in 1790, as much as suggests the existence of any such principle as the Court has applied here.

In rejecting the holding of the Court of Appeals that CATV "performs", this Court denied the force of precedent to its decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, saying, Slip Op. 6, 36 USLW 4657, fn. 18:

> The court [of Appeals] formulated and applied this test in the light of this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191. See also *Society of European Stage Authors & Composers Inc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937). But in *Jewell-LaSalle*, a hotel received on a master radio set an unauthorized broadcast of a copyrighted work and transmitted that broadcast to all the public and private rooms of the hotel by means of speakers installed by the hotel in each room. The Court held the hotel liable for infringement but noted that the result might have differed if, as in this case, the original broadcast had been authorized by the copyright holder. 283 U.S. at 199, n.5.

In thus disposing of *Jewell-LaSalle*, the Court clearly overlooked that the *single* reason given by Mr. Justice Brandeis as to why "the result might have differed if * * * the original broadcast had been authorized by the copyright holder" (Slip op. 6 fn. 18, 36 USLW 4657) was *not* that in such circumstance the hotel company would not have "performed", but, expressly, that 283 U.S. at 199, n. 5:

> If the copyrighted composition had been broadcast * * * with plaintiffs' consent, *a license for its commercial reception and distribution by the hotel company might possibly have been implied.* [Emphasis supplied.]

This comment of Mr. Justice Brandeis is thus wholly irrelevant to the holding in *Jewell-LaSalle* that the hotel company "performed" the copyrighted composition, and it does not detract one whit from the force of that holding, that the case *might* have gone against the copyright owner on the theory of an implied license, if the original broadcast had, as in this case, been expressly licensed. Indeed, by suggesting the possibility that the hotel company's "commercial reception and distribution" *might* have been impliedly licensed if the original broadcast had been licensed, this Court made it plain that whether the original broadcast was licensed or not, in doing what it did, the hotel company "performed" the copyrighted composition.[5]

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[5] Here the issue whether CATV's commercial reception and distribution "was impliedly licensed by the licensing of the original broadcast", was reserved for future trial and determination by the District Court, and was not before the Court of Appeals or this Court (A25, 165-168, 174).

IV

Notwithstanding the differences in their ways of doing business and the means each employs to accomplish its purpose, the essential function of both broadcasting stations and CATV is to make television programs available to the public.

In enumerating the differences between CATV systems and broadcasting stations, Slip. Op. 9, 10, 36 USLW 4658, 4659, the Court fails to note that such differences pertain only to their methods of doing business and their means of achieving the end result and overlooks the complete identity of their essential function, which is to make television signals available for reception by viewers' television sets for reconversion "into the visible images and audible sounds of the program". Slip. Op. 7, 36 USLW 4657.

In fulfilling this function it is immaterial that broadcasters arrange programs, while CATV takes them as it finds them; that broadcasters make programs available to the public without discrimination, while CATV serves all members of the public who are willing to pay to receive the programs; or that broadcasters distribute programs through the air, while CATV distributes them by cable. For, as Mr. Justice Holmes said for this Court in *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55, 61, 62, where in 1911 the exclusive right of authors under the 1891 Copyright Act "to dramatize their works" was held applicable to motion pictures,

> [t]he essence of the matter * * * is not in the mechanism employed, but that we see the event or the story lived.

In either manner, and by either method, what is intended, and what is accomplished, is that viewers "see the event or the story lived". And it is, clearly, the single

function of both broadcasters and CATV to bring that about.

The complete identity of the essential function of a broadcasting station and that of a CATV system is readily perceivable. Thus, consider any two neighboring houses at the same time any given evening, with the families living in each sitting around their respective television sets, watching the programs of their choice. The scene in both homes is the same, but one family is watching a broadcast by a "local" television station and received "off the air", and the other is watching a broadcast by a "distant", out-of-range television station, received, amplified, retransmitted and distributed by cable by CATV. Thus, in each case, the broadcaster and the CATV system serve and perform one and the same function—to make television programs available to those having receiving sets who may wish to see them. That they achieve this result by different means must, for copyright purposes, be immaterial, for Sections 1(c) and 1(d) of the Copyright Act explicitly provide that they apply to performances made "in any manner or by any method whatsoever".

The Court's citation, Slip Op. 9, fn. 28, 36 USLW 4658 of *Intermountain Broadcasting & Television Corp.* v. *Idaho Microwave, Inc.*, 196 F. Supp. 315 (S.D. Idaho, 1961) is inapposite. For, there, the action alleged was for unfair competition, brought by a "distant" television station against a CATV system which distributed its signals to members of the public located in an area beyond the distant station's range. While the differentiating factors to which the Court there points may have relevance in determining whether the broadcaster and the CATV system involved were competitors, this Court clearly overlooked their utter irrelevance in determining whether either, or both of them, "performed" the copyrighted works contained in the broadcasts each of them brought to thousands of homes. Whether in doing what it does CATV "performs" the

copyrighted works in the broadcasts it distributes cannot depend on whether it receives its remuneration from advertisers or viewers, or on whether it has anything "to do with * * * program content or arrangement". *Herbert* v. *Shanley Company*, 242 U.S. 591. The single point of *Intermountain* was that, by reason of the differences in the manner in which and the places where they conducted their businesses, a CATV system was not in competition with, and, accordingly, could not unfairly compete with a "distant" television station whose broadcasts it distributed in an area beyond the station's range. That this is all that *Intermountain* teaches is emphasized by the same Court's *later* decision that a CATV system did unfairly compete "for television viewers" with the "local" broadcasting station serving the area into which the CATV system imported a distant broadcasting station's signals. *Cable Vision, Inc.* v. *KUTV Inc.*, 211 F. Supp. 47, rev'd on other grounds, 335 F. 2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989.[6]

It should be observed, moreover, that the selection of programs is by no means an inherent characteristic of broadcasting. Television broadcasting systems such as UHF translators, which receive the signals of VHF televi-

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[6] Cf. *First Report and Order*, 38 F.C.C. 683, 701, 702 (1965), where the Federal Communications Commission said:

> It is often asserted that CATV systems do not, in fact, compete with broadcasting stations, since they do not compete for the advertising dollar on which commercial broadcasting lives. While superficially appealing, we cannot accept this view * * *.
>
> In large part * * * the CATV industry brings to areas already served by one or more stations the signals of other stations which are well beyond the normal range of reception.
>
> * * * When a cable system brings to a station's market additional signals which would not be readily available in the system's absence, it introduces competition for audience attention—and audience attention is the basic commodity that a station sells to advertisers.

sion stations, translate them into UHF frequencies and then rebroadcast them, and VHF repeater stations and satellite stations, which receive signals of broadcasting stations and then amplify and rebroadcast them in areas not reached by the station originating the signals, A 56, E 283-286, do not make any selection of programs, but merely retransmit whatever programs are broadcast by the originating stations whose signals they translate or amplify, and then rebroadcast.[7] Neither operators of translators, of which there are approximately 2,000 in the United States, nor the operators of satellites or repeaters claim the right to rebroadcast copyrighted programs without authority of the copyright owner. Cf. *First Report and Order*, 38 F.C.C. at 704, 705.[8]

The similarity between CATV systems and repeaters, translators and satellites reaches beyond the mere absence of selection of programs. None of such facilities—as none of the CATV system here involved—either originates, procures or selects its programs; each, including CATV, uses substantially the same type of equipment to receive and process signals for retransmission, A 1088-1148, 1216-1227, each retransmits the programs it receives, and processes, to members of the public in areas where viewers could not receive them with ordinary equipment, and each thus finds its function, in the total process of television

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[7] 47 C.F.R. § 74.731(a) reads as follows:

> Television broadcast translator stations provide a means whereby the signals of television broadcast stations may be retransmitted to areas in which direct reception of such television broadcast stations is unsatisfactory due to distant or intervening terrain barriers.

[8] If *Fortnightly* stands, copyright proprietors will lose revenue from translator and satellite stations who, although currently paying royalties, will hereafter refuse to do so, asserting that by application of the same functional test applied in *Fortnightly*, they, who also merely relay programs, do not "perform" and are therefore free from copyright liability.

broadcasting and reception, as a device to bring television programs into areas in which they would not otherwise be received, or received satisfactorily.[9]

Furthermore, in this context, it must be recognized as a distinction without a difference that broadcasters "propagate" their programs "to the public" while CATV systems "carry them by private channels to additional viewers", Slip Op. 10, 36 USLW 4658. The record is clear that such "additional viewers" are any members of the public located in the area served by the CATV system

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[9] The District Court so found, A 57, on the testimony of *Fortnightly's* principal expert witness, Mr. A. Earl Cullum, before a Senate subcommittee (Hearings on S 1739, S. 1741, S 1801, S 1886, and S 2303 Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 86 Cong., 1st Sess., 579-603 (1959), set out at E277-293). Mr. Cullum testified that all such systems (translators, repeaters and CATV) are "similar in their reliance on broadcast signals and in the extent to which they will go to receive signals from television broadcast stations", and that the "systems differ only in the method of distribution of the signals after they have been received". Cf. A 1088-1148, 1216-1227, E283.

In *Lilly* v. *United States*, 238 F. 2d 584 (4th Cir. 1956), cited by the Court, Slip Op. 8, fn. 26, 36 USLW 4658, for the proposition that CATV is "a mere adjunct of the television receiving sets with which it was connected * * *", the Court held that the fees payable by subscribers to CATV operators were not subject to an excise tax levied upon "wire and equipment service". In so holding, the Court observed, 238 F. 2d 588, that "Congress has never taxed television transmission or reception. It is admitted that a booster station maintained by a transmitting station would not be subject to the tax; and we see no reason why owners of receiving sets should be taxed upon amounts paid for equipment analogous to a booster station to make their sets workable". This case then holds, in substance, that CATV, like television transmission and reception, was not subject to the tax in question and in so doing analogies CATV to booster (i.e., repeater) stations. It is, accordingly, hardly authority for the proposition that CATV bears any different relationship to reception than does broadcasting by either originating or repeater stations.

who are willing to pay CATV's price. Thus, both broadcasters and CATV supply the public with television programs, and it has never heretofore been considered by this or any other Court that the production of a copyrighted work, for example, in a public square for the free enjoyment of all those who were there to see it, and which is paid for otherwise than by the audience, was a "performance", while a production open to the public, but only on the payment of an admission price, was not. Nor have the numbers of those in the audience ever been considered material. Rather, the criterion has been whether viewing the production is open to all upon the payment of such charge, *if any*, as may be levied. Nimmer, on Copyright (1968) § 107.21.

The concept that a CATV system retransmits and distributes "programs that have been released to the public", Slip Op. 10, 36 USLW 4658, is patently an erroneous one. The programs that CATV distributes have, indeed, been performed in public by broadcasters, but they have not thereby been "released" or "dedicated" to the public. A broadcast is like a production in a public square for all to see who wish to do so—a public performance, of course, but not a "release" or an abandonment of the copyright, or a relinquishment of the work to the public, for any and all publicly to perform without license.

Nor is it material in this connection that broadcasters "disseminate" the programs to the public through the airwaves, while CATV systems "transmit" or "carry" them to the segment of the public they serve by cable. Slip Op. 1, 2, 7, fn. 20, 36 USLW 4656-4658. Thus, it is recognized that the transmission to members of the public by telephone wires of sounds produced by playing phonograph records constitutes a public performance. *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), aff'd sub nom. *Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959).

V

The holding that CATV does not "perform" within the meaning of the Copyright Act frustrates the purpose of such Act and defeats the social ends it was intended to achieve.

In narrowly construing the words "to perform", as used in Sections 1(c) and 1(d) of the Copyright Act, so as to exclude CATV retransmissions of television broadcasts for simultaneous viewing by members of the public, the Court overlooked the essential purpose of copyright and the social ends it was intended to achieve.

The Court refers, Slip Op. 5, text and fn. 15, 36 USLW 4657, to the legislative history of the Copyright Act to note only that the attention of the Congress was directed to the problem arising when the dialogue of a play is transcribed without authority by a member of the audience, and the play is thereafter produced with the aid of the transcript. Yet, it would seem clear that, if that were the only problem which the Congress sought to deal with, it would have stopped with the enactment of that part of Section 1(d), which grants the author the exclusive right "to make or to procure the making of any transcription or record" of the dramatic work from which it may be performed. But the Congress did *not* stop there. One the contrary, at the instance of President Theodore Roosevelt, it enacted Section 1(d) couched in the broadest language imaginable as legislation intended to protect the copyright proprietor against the whole range of modern reproductive processes.[10]

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[10] House Committee Report No. 2222, 60th Cong., 2d Sess. (1909), in recommending the adoption of what became the Copyright Act of 1909, quoted the following from a message of President Theodore Roosevelt to the Congress in December 1905:

It is clear that the guiding principle must be found in the purpose of copyright and in the ends it is intended to serve. *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, 346. Copyright has its origin in the power granted to the Congress in Article I, Section 8, Clause 8, of the Constitution, "To promote the progress of * * * useful Arts, by securing for limited Times to Anthors * * * the exclusive Right to their respective Writings * * *", and as this Court said in *Mazer* v. *Stein,* 347 U.S. 201, 219:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that *encouragement of individual effort by personal gain is the best way to advance public welfare* through the talents of authors and inventors in 'Science and useful Arts'. Sacrificial days devoted to such creative activities deserve rewards, commensurate with the services rendered. [Emphasis supplied]

It is in this context that it must be determined whether CATV's retransmissions, for its own commercial purposes, of broadcasts of copyrighted works to the public are or are not performances within the meaning of Sections 1(c) and 1(d) of the Copyright Act. If they are not performances, then the "sacrificial days devoted" to the creation of such programs, symbolized by copyright, are left unrewarded so far as CATV retransmission is concerned, while CATV entrepreneurs are left "reaping where they ha[ve] not sown". *Associated Music Publishers* v. *Debs Memorial Radio Fund,* 141 F. 2d 852, 855 (2d Cir. 1944).

Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, *under modern reproductive processes, are entitled to protection;* they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public. * * *. [emphasis supplied]

Thus, the holding that, in retransmitting television programs containing copyrighted works for simultaneous viewing by large segments of the public, CATV does not perform at once denies the "encouragement of individual effort by personal gain", which "is the best way to advance public welfare through the talents" of authors and other creative artists whose efforts alone make the programs possible, and frustrates the essential purpose of copyright and the social ends it is intended to achieve.

As the Court noted in *Southwestern*, Slip Op. 4-9, 16-18, 36 USLW 4554-4556, 4558-4559, the numbers of viewers who receive television programs via CATV has grown, and is growing with such rapidity, and in such proportions, that CATV has become a serious threat to the economic viability of existing television stations, and a strong discouragement to the establishment of new ones.

The Court has expressly refrained from passing on the validity of any of the particulars of the current pattern of the Commission's regulation of CATV, *Southwestern*, Slip Op. 9, 36 USLW 4556, and there can be no assurance that the Commission will continue in its present efforts, through such devices as its "distant signals" rule, to curtail the growth of CATV in the major market and to limit its retransmission of television programs elsewhere. Furthermore, if as the Court has held here, CATV "falls on the viewer's side of the line", rather than the broadcaster's, Slip Op. 8, 36 USLW 4658, and is merely an adjunct to the viewer's receiving set, there may be, as pointed out above, a grave constitutional question as to the extent, if any, that governmental action may be taken which would have the effect of denying the people the "right" to hear and view such programs as they can receive through the use of what the Court here characterizes as being merely "a well-located antenna with an efficient connection to the viewer's television set". Slip Op. 8, 36 USLW 4658. *Cf.*

Griswold v. *Connecticut*, 381 U.S. 479, 482; *Weaver* v. *Jordan*, 64 Cal. 2d 235, 411 P. 2d 289 (1966).

Thus, in one way or another, the numbers of viewers receiving television programs via CATV, both proportionately and in absolute terms, would appear destined inevitably to continue to grow. The Court has noted the Federal Communications Commission's expert judgment of the adverse impact this growth is having and must continue to have on broadcasting as a result of its "dividing the available audiences and revenues". *Southwestern*, Slip Op. 18, 36 USLW 4559. And, in consequence, while the number of viewers of television programs will grow with CATV, so long as the decision here stands, the reward to the creative artists must shrink, as broadcasters become fewer, and their audiences smaller. The end result must be that less and less talent will be attracted to the creation of television programs and that the standard of quality of such programs will inevitably suffer.

Moreover, so long as the decision here stands, its adverse impact on television programs will be augmented by the consequences it holds for the performing artists, who, while not copyright holders, receive the larger part of their compensation out of the royalties the copyright holders receive from licenses. Thus, Charlton Heston, president of the Screen Actors Guild, has testified:[11]

> * * * the Screen Actors Guild is a labor union, and * * * it represents * * * 16,000 members of not a very lucrative profession * * * whose average income is well under $3,000 a year * * * Television programs today bring in the bulk of the revenue for screen actors. Far less than half, only about a third

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[11] Hearings on S. 1006, Before the Subcom. on Patents, Trademarks, and Copyrights, of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., at 205-207 (1966).

of the moneys paid to film actors, come from theatrical film. Television is by far the largest souree of revenue for the members of my union.

And therefore what happens in television is of enormous concern to the membership of the Screen Actors Guild. * * *

* * * a very important factor in the economy of the film actor is the fact that if a program in which he appears is run a number of times, or indeed more than once, he is additionally compensated. For the minimum player this compensation can amount eventually to more than he was originally paid. Without it, he would not earn even the $3,000 annual average he now does.

VI

Certainly, in bringing television programs of "distant" stations into areas for which they were not intended and cannot be viewed or heard, CATV is not a mere aid to viewing. In Fortnightly, half the broadcasting stations, whose programs were carried by petitioner's systems, were distant stations.

As *Southwestern* points out, Slip. Op. 5, 36 USLW 4555, CATV systems serve to perform either or both of two purposes:

> First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.

In other words, CATV serves to carry programs of broadcasting stations to areas that such stations would serve, but for topographical peculiarities, which make satis-

factory reception of their signals impossible and, secondly, to import the programs of television stations into areas beyond their transmission range. Here, the record is clear. The CATV systems involved rendered both services in the Clarksburg-Fairmont area. Indeed, the record shows that, but for topographical peculiarities, the Clarksburg-Fairmont area would have been served by only half of the broadcasting stations whose programs the CATV systems in suit carried, while the remaining half of the broadcasting stations whose programs they carried were "distant" stations, whose service areas did not include Clarksburg or Fairmont.[12] Additionally, the programs of two television stations located in the Clarksburg-Fairmont area were capable of reception throughout the area without CATV intervention. Slip Op. 1, 36 USLW 4656; A 36.

In holding that in the circumstances of this case, Slip. Op. 8, fn. 25, 36 USLW 4658, "a CATV system no more than enhances a viewer's capacity to receive a broadcaster's signals" Slip. Op. 8, 36 USLW 4658, the Court necessarily overlooked that the Clarksburg-Fairmont area was outside the service areas of half the television stations carried by the CATV systems here involved and that "the publi for which" a broadcast is "intended", Slip. Op. 10, fn. 28, 30, USLW 4658, 4659, does not include viewers residing beyond the broadcasting station's normal service area. Moreover, as the record makes clear, persons within the Clarksburg-Fairmont area could not receive the programs of the Pitts-

[12] Clarksburg is outside the "A" contour of all of the stations in Pittsburgh, Wheeling and Steubenville. It is also outside of the "B" contour of all three stations in Pittsburgh and of the Steubenville station, and is within a "B" contour only of the station in Wheeling. Fairmont is outside the "A" contour of all of the stations in Pittsburgh, Wheeling and Steubenville, and is outside the "B" contour of one of the three Pittsburgh stations and the Steubenville station. It is within the "B" contour line only of the Wheeling and two of the Pittsburgh stations (E 394, 397, 401, 405, 409). See *Southwestern*, Slip Op. 5, fn. 16.

burgh, Wheeling and Steubenville stations without the intervention of CATV. A 35, 36, 237-241, E 97, 98, 103, 115, 223, 224, 228-232, 234, 235, 237, 239, 258. Under these circumstances, to speak of CATV as doing no more than to "enhance" the capacity of viewers in the Clarksburg-Fairmont area, to receive the broadcasts of television stations in whose service areas they do not live, is directly counter to *Southwestern's* concept of CATV's function in these conditions as being to "*transmit* to subscribers * * * signals * * * entirely beyond the range of local antennas." Slip. Op. 5, 36 USLW 4555.[13]

VII

The holding that CATV does not "perform" is fraught with adverse consequences for broadcasters and the public.

In holding that CATV does not "perform" within the meaning of the Copyright Act, the Court overlooked the adverse consequences to television broadcasting and the public interest of denying copyright protection to television programs with respect to CATV retransmissions of them.

A primary goal of television service in the United States is to make available to the public the most varied and highest quality television programs possible. On first impression, the easiest way to achieve this goal would seem to be to lift all FCC restraints on CATV transmissions of

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[13] The FCC, in its recent decision in *Midwest,* Docket 16786, *supra,* fn. 2, emphasized that it was not the intent of the Commission that residents of San Diego receive signals from Los Angeles. The Commission pointed out that if it had "deemed such a result in the public interest, we would take steps to make Los Angeles signals satisfactorily available off-the-air to the entire San Diego public, by increasing the heights and power of the Los Angeles stations and authorizing the Los Angeles licensees to operate translator and satellite facilities in the San Diego area * * *", 13 Pike and Fischer R. R. 2d at 724 (1968).

distant signals and on the duplication of local programs, and to make available to all viewers throughout the country all the programs broadcast by stations in New York, Chicago, Los Angeles and other great urban centers.

Yet, while superficially promising, such a course would be found on closer inspection to be impracticable because nationwide proliferation of such programs would destroy local broadcasting and defeat the national public policy of encouraging the development of local broadcasting and avoiding the domination of broadcasting by a handful of metropolitan superstations, and the national advertisers who support them.[14]

But in the absence of copyright protection, the FCC regulations currently in effect do not achieve their purpose of protecting local broadcasters from destruction, because the rule banning the importation of distant signals applies only in the 100 top markets and the nonduplication rule, in effect,

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[14] *First Report and Order*, 38 FCC 683, 699-700, text and fn. 22 (1965); *Second Report and Order*, 2 FCC 2d 725, 771-776, text and fn. 54, 779 (1966) Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Report to the Federal Communications Commission* (Government Printing Office, 1965) p. 11.

An even simpler way of extending the range of selected stations to all corners of the United States would have been the creation of a network of translators and repeaters, to make the programs of the dominant stations available not only to paying subscribers near cable trunk lines in densely populated areas as CATV does, but indiscriminately to all potential viewers throughout the country, including rural areas where CATV cannot operate economically. Seiden, *op. cit.*, pp. 18-22.

The cost of building translators is substantially less than that required to install CATV systems (Seiden, *op. cit.* 25). But the FCC in its concern to develop local outlets of expression has deliberately and as a matter of policy "not turned to an alternative system of program distribution based upon a handful of 'superstations' and a nationwide network of wires, microwave and translators". *First Report and Order* par. 47, 38 FCC 700; *Carter Mountain Transmission Corp.*, 32 FCC 459, aff'd 321 F.2d 359 (D.C. Cir. 1963), cert. denied, 375 U.S. 951.

applies only to network programs.[15] The stations outside the top markets, however, are precisely those which are the least capable of surviving the impact of the unfair competition of CATV, and in addition, these stations depend primarily on the use of programs other than those distributed by the networks. Hence, in order to be effective, the ban on the importation of distant signals would have to be broadened and made applicable to all markets, whether large or small. Such extention of FCC regulation would indeed fully protect local stations but, at the same time, it would inhibit even more than the present rules do, the goal of the national communications policy of encouraging the dissemination of the greatest possible variety of quality programs. Indeed, FCC regulation can only exclude programs from an area, it cannot provide them. Obviously, program service for the public is not improved by banning, *i.e.* blacking out, programs. This is especially true in smaller areas where only one or two local stations operate and where, freed from CATV competition, these local stations would have no incentive to improve or vary the quality of their program service and would even be likely to reduce it.

It is CATV's privileged non-copyright position which is the essence of the problem. As the FCC has said, "while the CATV system and the local broadcaster provide the public with access to the same product—the programs created or sold for distribution through broadcasting stations",

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[15] The Commission states in its *Second Report and Order* with reference to the very limited protection which its prohibition of simultaneous duplication affords to UHF and independent stations that "* * * the non-duplication requirement will be of virtually no assistance, since what is involved is the establishment and healthy maintenance of independent stations, and non-network syndicated or film programming is not distributed on a simultaneous nationwide basis." 2 F.C.C. 2d 725, 778 (1966). As to the distant signals rule, it is applicable only in the top 100 markets and does not protect local stations in smaller markets. *Second Report and Order*, 2 F.C.C. 2d 725, 782, 783 (1966).

as competitors, they stand on an "unequal footing", in that the broadcaster has to "bargain and pay" for the product, while CATV does not, an "anomaly" which the Commission has characterized as not being "a fair method of competition."[16]

With the application of copyright to CATV, however, CATV and stations are placed on an equal footing, and the necessity for FCC restraints is lessened—permitting free and fair competition and a greater variety of programing for the public. Just as bans on programs cannot improve local programing, so also quality production of programs cannot be stimulated by depriving creative producers of royalties from CATV. In other words, FCC regulation alone, without copyright protection, cannot possibly achieve the objective of the Congressional policy of protecting broadcasters and at the same time improving programing.

Mr. Rosel Hyde, Chairman of the FCC, has recognized that communications regulations and copyright protection may play complementary roles, an arrangement which has worked so well in the television broadcasting field where stations as well as all auxiliary devices for the extension of signals, such as translators, repeaters and satellites,[17] are regulated in their communications aspects by the FCC, but at the same time are held subject to the copyright law, and therefore must recognize exclusive rights granted to competitors in their markets, and pay royalties for the use of copyrighted programs.[18]

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[16] *First Report and Order*, 38 FCC 683, 704-706 (1965); *Second Report and Order*, 2 FCC 2d 725, 736-737, 778-780 (1966).

[17] *First Report and Order*, 38 FCC 683, 703, 704-705 (1965); *Second Report and Order*, 2 FCC 2d 725, 736-737, 778-780 (1966).

[18] *First Report and Order*, 38 FCC 683, 703-705 (1965); *Second Report and Order*, 2 FCC 2d 725, 736-737, 778-780 (1966).

The Commission has recognized that its CATV regulations are fully compatible with copyright protection,[19] and the necessity for copyright protection was emphasized by Chairman Hyde when he testified at a Senate Subcommittee hearing[20] that "the Commission has long recognized that*** copyright is a key factor in the community antenna television field", noting that while there is a divergency of views at the Commission as to the need for FCC regulatory direction of CATV there is, however, "far greater unanimity in the Commission that copyright considerations should play an instrumental role in the CATV field. * * *"

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[19] *First Report and Order*, 38 FCC 683, 704, 740 (1965); *Second Report and Order*, 2 FCC 2d 725, 768-769, 778 (1966). The FCC said in its *First Report and Order*:

> We think it apparent * * * that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs.
>
> * * *
>
> We believe that a service such as CATV, which lives on the product of the existing television system and finds its justification as a supplementary service, should at a minimum give some measure of recognition to the fundamental distribution practices that have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries. 38 FCC 2d at 706.

[20] *Copyright Law Revision—CATV*, Hearings on S. 1006, Sub com. on Patents, etc., Senate Comm. on the Judiciary, 89th Cong. 2d Sess. August 2, 1966, pp. 13, 14. Mr. Hyde during the same testimony also explained (at p. 78):

> Thus, the nonduplication requirements bear quite closely on the copyright question. The broadcast industry competes and pays for programing in the open market; it has developed a system of exclusive rights that are bargained and paid for. For

VIII

The fear here expressed that CATV copyright liability under the decision of the Court below would result in liability for suppliers of television receiving sets, and the owners of apartment house master antennas, is wholly unfounded.

In holding, Slip Op. 6, 7, 36 USLW 4657, that the decision of the Court below that CATV "performed" the broadcasts it distributes would result in copyright liability for owners of apartment houses supplying common antennas for their tenants, shopkeepers who rent or sell television sets, and manufacturers of such sets, the Court overlooked the context of the very brief passage, 377 F. 2d at 877, which it quotes from the opinion below, and, in consequence, overlooked its essential meaning. Thus, on the page preceding the quoted passage, the Court below said:

> In the light of prior decisions and of the policies of the Copyright Act, the result brought about by one of [petitioner's] CATV systems—the simultaneous viewing of [respondent's] copyrighted motion pictures on the television sets of as many as several

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example, a station may pay for the right to show a feature film package in its area for a specified period on an exclusive basis. Or, it may enter into an agreement whereby it gets the right of first call on network programs, and, in turn, gives up to the network very considerable compensation in the form of the division of the proceeds from the sale of time on its facilities. These are the fundamental distribution practices of the broadcast industry's program market which have historically been sanctioned by copyright, antitrust, and communications law.

The CATV is essentially dependent on the broadcast system for its product. Yet CATV presently does not compete in the marketplace for the programing which is the commodity it sells to its subscribers. It is not presently bound by those fundamental practices of the broadcast industry just referred to. Therefore, on its distant city signals, the CATV often brings into the local community the film package or the network program for which the local station has bargained and obtained distribution rights.

> thousand of [petitioner's] subscribers—is fairly characterized as a public performance infringing the copyrights.

Hence, the test adopted by the Court below relates to the extent of the contribution made by the CATV system involved to the *simultaneous viewing of television broadcasts of copyrighted works in more than 60% of the housing units in the towns of Clarksburg and Fairmont,* rather than to CATV's contribution to the television reception by individual viewers, as such. Accordingly, the *ratio decidendi* of the Court below would not lead, as the Court assumes, to treating shopkeepers who sell or rent television sets or television set manufacturers as infringers. For, while supplying the means of reception that contribute to each set owner's viewing, they do not contribute to the *transmission* of programs for simultaneous viewing by members of the public, which forms the basis of the concept of public performance by means of electronic transmission.[21] Moreover, since by viewing, viewers do not in any event infringe, even if the performance they watch does, it must be clear that those who manufacture or sell or rent television receiving sets to viewers would in no circumstance be subject to liability for infringement. Accordingly, if CATV were held liable for infringement on the basis of the test of the Court below, it would not

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[21] In recognizing that broadcasters "perform", i.e., "publicly perform" within the meaning of the Copyright Act, Slip Op. 8, 36 USLW 4658, this Court cited in fn. 23, and impliedly approved the reasoning of *Jerome H. Remick & Co.* v. *American Auto Accessories Co.*, 5 F.2d 411, 412 (6th Cir. 1925), that a broadcaster "performs" in the sense of the Copyright Act because he "is consciously addressing a great, though unseen and widely scattered, audience", notwithstanding that each member of the audience "may enjoy" the broadcast "alone in the privacy of his home". The Court below properly summarized *Remick* and subsequent cases as holding, 377 F.2d at 879, that:

> a broadcast or other transmission of a work to the public or cross-section of it results in the public performance although each individual who chooses to enjoy it does so in private.

follow that makers, vendors or lessors of receiving sets would similarly be liable.

So far as concerns apartment house master antennas, it may first be observed that apartment house owners are no more engaged in communications because they furnish antennas for the use of their tenants than they are in laundering or catering because they supply their tenants with washing and drying machines and cook-stoves. Moreover, it is common knowledge that the landlord's purpose in supplying a master antenna for use by his tenants, and the function it is intended to serve, is to keep the building's roof free of the jungle of antennas it would otherwise sprout if each tenant were to erect his own antenna. In this way, the landlord avoids the burden of policing the erection of a host of antennas and seeing to their proper maintenance, lest he incur liability for negligence if any should fall, and he keeps the roof clear of obstacles that might impede the fighting of fire and prevent its full utilization for recreational and other purposes.

In assimilating CATV to apartment house master antennas, and vice-versa, the Court overlooked the expert judgment of the Federal Communications Commission, *Second Report and Order*, 2 FCC 2d 725, 780 (1966):

> The answer is sometimes given that the CATV system is simply a master TV antenna, and therefore on this ground should be allowed such different competitive conditions. But this answer does not withstand analysis. * * * If the distant signal is freely available for use in the area, as the CATV argues, why is it not just as freely available for use by the broadcast stations in the area (e.g., through a tall antenna on a high elevation). Clearly, however, it is inconsistent with all notions of propriety to say that a Philadelphia or Baltimore UHF station may make whatever use it desires, without permission or payment of the programing carried over the New York independents.

The latter is precisely the case of the CATV systems serving Clarksburg and Fairmont.

IX

The legislative history of the Copyright Law Revision Bill lends no support to the holding in this case and emphasizes the need for rehearing.

The decision misapprehends the legislative history of the so-called "CATV provision" of the pending Copyright Law Revision Bill. The Court says in *Fortnightly* that the "CATV provision" was deleted by the House "in order to refer the matter to the Interstate and Foreign Commerce Committee, which has jurisdiction over communications".[22] But, reference to the facts surrrounding this quotation reveals the very opposite conclusion than that for which the quotation was cited.[23] Furthermore, it

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[22] Slip Op. 5, 6, fn. 17; 11, 12, fn. 33, 36 USLW 4657, 4659.

[23] The deletion of the "provision dealing with CATV" (Slip Op. 6, fn. 17, 36 USLW 4657) and the statement of Congressman Moore quoted in the Court's footnote 33, Slip Op. 11, 36 USLW 4659, must be understood in the light of the retention by the House of Section 106(4) of said Bill which grants to the owner of copyright the exclusive right "to perform the copyrighted work 'publicly' ", and Section 101 which defines the right so granted in a manner clearly including CATV.

That the House, in preserving the general copyright applicability to CATV transmissions under Sections 101 and 106, did so intentionally appears in the colloquy between Congressmen McClory and Ottinger (113 Cong. Rec. H. 3858, April 11, 1967) and in the further clarifying remarks of Congressman Ottinger (113 Cong. Rec. H. 4468, April 20, 1967).

The deleted Section 111 merely contained limited copyright *exemptions* for certain specified types of CATV transmissions, but even these limited exemptions were subject to certain exceptions which would have excepted all CATV systems engaged in the origination of programs or in pay television from the benefit of the exemptions. It was to these exceptions from the exemptions that Congressman Moore addressed himself in the passage quoted by the Court in footnote 33 when he criticized Section 111 as dealing with matters of "communications policy" which, he felt, were "not a proper functio[n] of copyright".

was also the sense of the House that "the Committee on the Judiciary would have primary concern over copyrights" and that the Committee on Interstate and Foreign Commerce would have primary concern over "regulation of CATV".[24] The House did not decide that the rights of creators and owners of copyrighted works should be regulated by the Federal Communications Commission.[25]

Also, an effort to exempt CATV from copyright liability was defeated.[26] Congressman Celler stated the overwhelming opposition to such special privilege (113 Cong. Rec. H. 3880):

> * * * why should CATV be free from payment of copyright royalties? Why should it get the preference which is not accorded all other industries? TV pays royalties. Radio pays royalties. Juke boxes will pay royalties. Cabarets will pay royalties. Concerts pay royalties. Movies pay royalties. Theatres pay royalties. But we have now an invidious distinction, a preference which is utterly unjustified with reference to CATV. * * *
>
> Let us see what CATV really is and see who are the people that the gentleman from West Virginia wants to help. There are 1,502 such television systems that pick up, as it were, programs from TV-licensed stations and networks and siphon off programs which, according to what the amendment would imply, would charge the listeners fees, but would pay nothing in the way of royalties to that which is the sine qua non of CATV, the work of the

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[24] Remarks of Congressman Celler, Chairman of the Judiciary Committee, 113 Con. Rec. H. 3857 (April 11, 1967).

[25] See the remarks of Congressman Staggers, Chairman of the Committee on Interstate and Foreign Commerce, *ibid.*: "If the CATV-TV provision is brought up in our committe and the matter of copyright is involved, it will go to the Committee on the Judiciary for their consideration."

[26] Amendment to Copyright Law Revision Bill introduced by Congressman Moore, 113 Cong. Rec. H. 3880 and defeated 113 Cong. Rec. H. 3883, April 11, 1967.

> creative artists: So they would pay nothing to the authors of the poetry, to the dramatists, to the song-writers, whose work the CATV would appropriate. They would become free riders. I cannot accept that. I cannot stomach that, especially in view of the arrangement that has been made.

However, the deletion of § 111 and the defeat of the total exemption for CATV is no indication that Congressional amelioration of the consequences of the Court's decision here is near at hand. As of now, the matter is dormant.

So far as concerns the likelihood of copyright legislation in the reasonably foreseeable future, it must be recalled that the history of the effort to bring about copyright revision in the Congress has been long and tortuous. For a decade or more, the Copyright Office, the copyright bar and the professions and industries concerned with copyrighted works have labored to that end, wholly without success to date. Thus, the Register of Copyrights said in his remarks, made at a meeting held under the auspices of the Senate Subcommittee on Patents, Trademarks and Copyrights on April 18, 1968, that the prospect for copyright revision presented a "gloomy picture" and that

> [t]o assume that next year the bill as a whole will stay intact, that the remaining issues will be resolved readily, that existing accommodations will stick, that no new major issues will arise, and that the bill will go easily through both Houses, is simply to ignore the lessons of experience.

Indeed, a number of thorny and highly complex problems [27] are newly arisen, and a resolution of any one of

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[27] e.g., the right to use copyrighted materials for teaching and learning purposes or in electronic storage and retrieval systems; the right to duplicate copyrighted works by means of xerographic high-speed duplicating devices for office or classroom use; the protection of the rights of performing artists through copyright, etc.

them, no less than the resolution of them all, is likely to keep copyright revision in a mire of indecision for years to come.

The New York Times in an editorial of June 24, 1968, p. 36, commented on this point. After referring to CATV as "a form of piracy", it continued:

> To make it all sadder, anyone who has followed the excruciating history of the unsuccessful attempts to modernize the copyright laws in Congress in the last decade knows that the private-interest lobbies have shown too much political muscle to permit great hope for legislative rectification of the injustice.

We do not argue that the unlikelihood of Congressional relief is the Court's concern. It is, rather, that the legislative history of the Copyright Law Revision Bill lends support neither to the Court's holding here, nor to any expectation that its shattering effect on the whole fabric of copyright may soon be repaired by the Congress. It is in this circumstance that the Court is urged to reconsider its decision and to adhere to the hitherto firmly rooted principles on which copyright protection has been based.

X

Granting the petition for rehearing and affirmance of the decision below would preserve the existing business relationships which the reversal has jeopardized.

The opinion here refers to *Jewell-LaSalle* as "a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context * * * ".[28] Such a disposition of a landmark case in the field of copyright, long considered the authority in regard to other than "live" performances, is surely unwarranted in the light of the extent to which its teachings have become a fountainhead from which an entire branch of the law has developed.[29]

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[28] Slip Op. 10, fn. 30, USLW 4659

[29] The failure of what are but two groups of owners of copyrights on musical compositions (ASCAP and BMI) fully to enforce their rights under *Jewel-LaSalle*, Slip. Op. 10, fn. 30, dissent fn. 3, 36 USLW 4659, 4660, certainly cannot serve to overrule a landmark decision of this Court, or to diminish its force, or effect either as precedent or as a carefully reasoned and unimpeachable statement of basic copyright principles. These principles as expounded in *Jewel-LaSalle*, have been followed as precedents and applied in a great number of situations "outside its own factual context", e.g., *Metro-Goldwyn-Mayer D. Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70, 76 (1st Cir. 1932), same case on remand 3 Fed. Supp. 66, 72 (D.C. Mass. 1933); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 54 (2d Cir. 1936); *Harms* v. *Sansom House Enterprises, Inc.*, 162 Fed. Supp. 129, 133, 135 (E.D. Pa. 1958), *affd. sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959); *Society of European S.A.A.C.* v. *New York Hotel Statler Co.*, 19 Fed. Supp. 1, 4 (S.D. N.Y. 1937); *Buck* v. *Newsreel, Inc.*, 25 Fed. Supp. 787, 789 (D.C. Mass. 1938); *Famous Music Corp.* v. *Melz*, 28 Fed. Supp. 767, 770 (W.D. La. 1939); *Buck* v. *Gibbs*, 34 Fed. Supp. 510, 515, fn. 6 (D.C. Fla. 1940), mod. on other gr. *sub nom. Watson* v. *Buck*, 313 U.S. 387; *Buck* v. *Cecere*, 45 Fed. Supp. 441 (W.D.N.Y. 1942); *Select Theatres Corp.* v. *Ronzoni Macaroni Co.*, 59 U.S.P.Q. 288, 290, 291; *Tiffany Productions, Inc.* v. *Dewing*, 50 F. 2d 911, 914 (D.C. Md. 1931); *M. Witmark & Sons* v. *Jensen*, 80 Fed. Supp. 843, 847 (D.C. Minn. 1948); *Beban* v. *Decca Records*, 169 Fed. Supp. 829, 830 (S.D. Cal. 1959).

The Court suggests that to have followed *Jewell-LaSalle* would "hardly" have "preserved" business relationships, and would have been "retroactively to impose copyright liability where it has never been acknowledged before". Slip Op. 10, fn. 30, 36 USLW 4659. This overlooks the fact that whenever the law is applied to a new technique pursuant to the statutory language "in any manner or by any method whatsoever" (Sec. 1(c) and 1(d) of the Copyright Act), liability is necessarily imposed where it never had been "acknowledged" before. As the Court is well aware, however, the books are replete with such cases going for the plaintiff, and were it not so, sterility and atrophy, rather than a capacity to meet the demands of a dynamic society, would be the hallmarks of the law. The Court's suggestion and its rejection of the well established teachings of *Jewell-LaSalle* combine uniquely at once to deny both phases of "the great antinomy" of the law, that "Law must be stable, and yet it cannot stand still". Pound, *Interpretations of Legal History* (Macmillan, 1923) 1; see Cardozo, *The Growth of the Law* (Yale University Press, 1924) 2.

The holding here denies to the law of copyright both stability and the ability to move forward to meet the challenges of new technological advances. In so doing, it threatens the disruption of legitimate business relationships of long standing, predicated upon what was heretofore established principle, not only in respect to what consitutes a performance, but in regard to the law's viability and adaptability. If CATV is without copyright liability, what of the more than 2,000 UHF translators, whose operators have long "acknowledged" copyright liability for their retransmission of copyrighted television programs into "areas in which direct reception of such television broadcast stations is unsatisfactory due to distance or intervening terrain barriers",[30] and the operation of which differs from CATV's retransmission of such programs only in that they retransmit through the air while CATV uses a cable?

[30] 47 CFR § 74.731(a), *supra* fn. 7.

The decision here holds the direst forebodings, too, for the thousands of writers, composers, actors and others whose principal source of income is now television, rather than the older forms of entertainment, such as the stage, the screen, and the concert hall. Their future is, indeed, black, if CATV can freely exploit the product of their creativity and labor.[31] For, it must be doubtful whether the growth of CATV will be stemmed, and the prospect of new technological developments which, under the holding here, may share CATV's freedom from copyright liability can only serve further to encourage artists to employ their talents otherwise than in television. In the long run, no less than the short, this cannot but adversely affect program quality and the public interest.

It is of the utmost signifiance that responsible leaders of the CATV industry have acknowledged the suitability of copyright liability to their industry and that "copyright fees are a normal cost of doing business"[32] and that the

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[31] *The New York Times* in the editorial cited *supra* p. 37 entitled Technology and the Law, commented:

* * *[T]he decision created a regrettable precedent that fails to deal equitably with the new economic relationships affecting intellectual property in an era of technological revolution—a precedent we hope will not prove the last word in this rapidly moving field.

* * *

What makes this view of CATV as a passive instrument particularly astonishing is that only a week earlier the same Court ruled that CATV is subject to the regulatory authority of the Federal Communications Commission.

The crucial problem, with which the Supreme Court failed to deal realistically, is that CATV systems take other people's property —when they retransmit a televised original play, for example—and sell it for a profit. Under the Court's decision, CATV entrepreneurs are relieved from any need to compensate the creators and owners of this copyright material.

[32] Statement of J. Leonard Reinsch, a former director of the National Community Television Association, in the Bulletin of said Association of July 18, 1966, quoted in the letter dated September 6, 1966, from the American Society of Composers, Authors and Publishers to Senator Quentin N. Burdick, which is printed in Hearings before the Subcommittee on Patents, Trademarks and Copyrights, *supra* fn. 20 at p. 237.

effect of such payments "will not be materially adverse" to the operator.[33]

On the theory that relief which may be oppressively extreme should not be granted at all, CATV has raised the spectre of multimillion dollar damages—on the assumption that statutory damages must be awarded if the holdings below of copyright infringement were affirmed (Brief of National Cable Television Association, Inc. *amicus curiae* 20, text and fn. 36). This contention is based on a misconception of the applicable law. Decisions of this Court make it clear that a District Court has a discretionary choice to award actual damages or profits which would, in fact, limit the recovery to petitioner's unjust enrichment, or to award statutory damages within the range prescribed by Section 101(b). As this Court said in *F. W. Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228, 231, 234:[34]

> * * * [T]he statute has been interpreted to vest in the trial court broad discretion to determine whether it is more just to allow a recovery based on calculation of actual damages and profits, as found from evidence, or one based on a necessarily somewhat arbitrary estimate within the limits permitted by the Act.
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[33] Corporate prospectus of Teleprompter Corporation, a major CATV operating chain, quoted in the letter from the American Society of Composers, Authors and Publishers to Senator Quentin N. Burdick, *supra* fn. 32.

[34] See also, *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940); *Davilla* v. *Brunswick-Balke-Collender Co. of New York*, 94 F. 2d 567, 569, 570 (2d Cir. 1938); *Washingtonian Pub. Co., Inc.* v. *Pearson*, 140 F. 2d 465 (D.C. Cir. 1944); *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.*, 367 F. 2d 236, 240 (9th Cir. 1966) modifying in other respects, *Shapiro, Bernstein & Co.* v. *Bleeker*, 224 F. Supp. 595 (S.D. Cal. 1963), and 243 F. Supp. 999 (S.D. Cal. 1965); *Woodman* v. *Lydiard-Peterson Co.*, 192 F. 67, 71 (D.Minn. 1912); *Davis* v. *E. I. DuPont de Nemours & Company*, 249 F. Supp. 329 (S.D.N.Y. 1966).

> We think that the statute empowers the trial court in its sound exercise of judicial discretion to determine whether on all the facts a recovery upon profits and damages or one estimated within the statutory limits is more just.

Even if the copyright owners were to survive the defenses of laches, estoppel and implied license, which the the District Court reserved for later trial (A 74), the issue of damages (also so reserved) would be subject to the court's discretion and would come to this Court for further review.

XI

Summary of Highlights

Reconsideration of the decision here is necessary because the Court overlooked the following disastrous and unintended consequences of its decision:

1. The decision is wholly incompatible with that of this Court in *Southwestern*. If CATV, as *Fortnightly* holds, falls indeed "on the viewer's side of the line", the beneficial effect of *Southwestern* will be dissipated and grave questions will arise as to whether the the FCC, by regulation, may, within constitutional limits, prevent the unfair competition of CATV which threatens to destroy local broadcasting stations.

2. The decision is fraught with adverse consequences to the public and to authors, because in the absence of exclusivity patterns freely negotiated under copyright, as television stations do, the FCC can protect local stations against CATV inroads only through the blacking out of programs from distant stations, which neither serves the interest of the public in getting a greater variety and better quality of programs, nor aids the social end of the Copyright Act to reward and encourage the talents and efforts of creative producers through the payment of royalties.

3. The decision gives CATV systems a unique and privileged position in the television industry in that they may bring to their audiences for their own commercial purposes, copyrighted programs for the use of which they do not pay. A commissioner of the FCC, Robert E. Lee, has referred on two occasions to this unprecedented privilege as a "license to steal".[35]

4. In absolving CATV from liability on the ground that it merely does for viewers what each viewer can do for himself without copyright liability, the Court departs from the hitherto well settled principle of copyright law that a public performance is an infringement even though the same performance in private is not.

5. The decision here, in failing to apply the Copyright Act to CATV, which is only the latest of the novel means of transmission to the public, has abandoned the protection afforded the artist over the past half century, however novel the means were to exploit his work, whether motion pictures, radio, television or wire transmission to restaurants. The decision here has therefore created an upheaval in the copyright realm which is as unmeasurable as the fear that earlier novel methods of transmission considered subject to copyright now may be deemed unrealistically "to fall on the viewer's side of the line" (as if public performance could be defined by balancing in such scales) and the greater fear that future technological ingenuity may inherit CATV's unjust mantle of immunity.

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[35] Commissioner Lee so characterized the use of television programs by CATV in remarks before the Midwest Conference on Intergovernmental Communications held in Lincoln, Nebraska, on June 20, 1968, after referring to the "wired city or the wired nation" scheme to transfer all of television to cables. His remarks were further clarified in an interview reported in the *CATV Weekly* of July 1, 1968 p. 40, wherein he referred to CATV's free use of programs as a "license to steal".

When the commercial forces involved are examined, the frailty of the decision here is weighted with inequity of a profound moral nature. The enterprises operating CATV even in the present early phase number among them large affluent industrial complexes[36] which are absolved from making any payment to thousands of writers, composers, actors and crafts, whose works they use. Since it is already clearly on the horizon that CATV will become a billion and one-half dollar industry in a few years and that 59,000,000 homes[37] will be wired by CATV,[38] thus diminishing the average artist's present pitifully small income[39] from other

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[36] Among the industrial giants owning chains of CATV systems are General Electric Co.; General Telephone & Electronics; Westinghouse Electric Corp.; Time-Life, Inc.; Teleprompter Corp.; Triangle Publications, Inc.; Scripps-Howard Broadcasting, Inc.; General Instrument Corp., the owner of the Jerrold chain of CATV systems; H & B American; Avco Corp.; National General Corp. Television Factbook, Services Volume, 1968-69 Ed. No. 38. *CATV Weekly*, July 22, 1968, p. 6, reports that H & B American Corp. owns 37 CATV systems serving approximately 129,000 subscribers and just bought for roughly $35,000,000, the interest of Jack Kent Cooke and General Television, Inc., which owned 20 systems serving approximately 81,000 subscribers, including those in Clarksburg and Fairmont, here in litigation.

[37] The *Wall Street Journal* of July 15, 1968, p. 3, predicts big gains in CATV revenues and equipment sales "sparked by the recent Supreme Court decision that exempts CATV operators from any copyright liabilities." The *Wall Street Journal* also reports estimates "that about half of the 59 million TV homes in the U.S. will be connected with community antenna or cable-TV systems within five years" reaching yearly revenues of 1.8 billion as compared to 170 million in 1967.

[38] See *Southwestern* Slip Op. p. 6 text and fn. 18, 36 USLW 4555, noting the suggestion that "a nationwide grid of wired CATV systems interconnected by microwave frequencies and financed by subscriber fees, may one day offer a viable economic alternative to the advertiser-supported broadcast service".

[39] See testimony of Charlton Heston, cited *supra*, pp. 23, 24, text and fn. 11.

sources—the abandonment of copyright's traditional role as the protector of the arts is of the deepest concern.

From the public viewpoint there is added the imponderable, but weighty, consideration that the frustration of the artist and the copyright owner caused by denying to them recompense for the product of their creativity and investment, tends further to diminish the quality of entertainment already deemed deplorable by so many.

The instant decision falls well within the special boundary lines which should prompt the Court to grant rehearing.

Respectfully submitted,

LOUIS NIZER
GERALD MEYER
GERALD F. PHILLIPS
477 Madison Avenue
New York, New York 10022

LAWRENCE S. LESSER
1625 K Street, N.W.
Washington, D.C. 20006
Counsel for Respondent

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON,
Of Counsel.

The undersigned counsel for respondent hereby certifies pursuant to Rule 58 of the Rules of this Court that the foregoing petition is presented in good faith and not for delay.

/s/ LOUIS NIZER
Counsel for the Respondent